In the Supreme Court of the United States

OCTOBER TERM 1961

No. ____

GERTRUDE LANCASTER,

Petitioner,

vs.

W. GWYNN GARDINER and

JOHN C. HANCOCK, Trustees,

Respondents.

PETITION FOR CERTIORARI

In the Supreme Court of the United States

OCTOBER TERM 1961

No.

GERTRUDE LANCASTER,

Petitioner,

VS.

W. GWYNN GARDINER and

JOHN C. HANCOCK, Trustees,

Respondents.

PETITION FOR CERTIORARI

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1. REPORTS OF OPINIONS BELOW.

The official report of the opinion in the Court of Appeals of Maryland is as yet unreported. It is filed in the Court of Appeals of Maryland under Docket No. 304 September term 1960 decided May 4, 1961.

2. GROUNDS ON WHICH JURISDICTION IS INVOKED.

Your petitioner has been deprived of due process of law under the 14th amendment of the Constitution of the United States by the action of the court below in affirming a decision of the Circuit Court of Charles County, Maryland, which

operated to deprive your petitioner of valuable real property without just compensation and without fair notice or opportunity to be heard or an adequate hearing on the merits of her contention that she should not be deprived of such property in the manner sought in the trial court. The statutory provision believed to confer on this Court jurisdiction to review the decree in question by writ of certiorari is Title 28 United States Code, Section 1257 (3) and the 14th amendment of the Constitution of the United States.

3. QUESTIONS PRESENTED FOR REVIEW:

A. Whether your petitioner was deprived of due process of law by the action of the Circuit Court of Charles County, Maryland, which action was affirmed by the Court of Appeals of Maryland, in ordering your petitioner to appear on October 11, 1960, and show cause why its pleading entitled "Petition for Clarification of Charges" should not be dismissed, and at the appointed date and time, without notice, changing the purpose of the said hearing to a full hearing on the merits of the said "Petition for Clarification of Charges" without allowing your petitioner an opportunity to prepare her case in support of the said petition.

B. Whether your petitioner was deprived of due process of law by the action of the Circuit Court of Charles County, Maryland, which action was affirmed by the Court of Appeals of Maryland, in ordering the trustees of a trust estate which was then under supervision of the said Circuit Court to make sales out of the trust estate for inadequate consideration and contrary to the appraisal procedure which is applicable to such sales in Maryland.

C. Whether your petitioner has been deprived of due process of law by the action of the Circuit Court of Charles County as affirmed by the Court of Appeals of Maryland, in ratifying and condoning the action of the trustees of the estate which is involved in this cause, who have so mis-

managed the conduct of the sales which were then in issue in the courts below, violating every duty imposed upon them by the laws of Maryland and by considerations of due process, sacrificing the interests of your petitioner which were then completely under the supervision and protection of the courts below.

D. Whether your petitioner was deprived of due process of law by the action of the courts below in directing certain trustees' sales from and out of a parcel of real property of considerable size without any inquiry by the trustees by the court as to the effect of such sales on the property remaining, while denying your petitioner an opportunity to present evidence as to such effect.

4. STATEMENT OF THE CASE

In the Circuit Court of Charles County, Maryland the court had under supervision a trust estate comprising some 160 acres of water front property of which W. Gwynn Gardiner and John C. Hancock were trustees. Upon application of the trustees the trial court directed on May 17, 1960 that the trustees proceed with certain conveyances, no one of which would comprise more than an acre of land, in return for prices which the trustees recommended. The trustees had obtained a written memorandum, purporting to be an appraisal, which indicated certain land values for the parcels in question, but the testimony in the trial court reveals that in every instance more land was being conveyed than was appraised and a grossly inadequate amount was being obtained for the parcels sought to be conveyed, even according to the "appraisal" of the property prior to sale. Sale of trust property in conformity with an appraisal is required by considerations of due process and by the laws of Maryland. Your petitioner filed in the trial court a pleading entitled "Petition for Clarification of Charges" in which it brought to the court's attention the discrepancies between the description of the parcels contained in the court's order on May 17 and the description of those same parcels at the

hearing upon which that order was founded. A copy of this pleading is included in the appendix hereto. The trustees filed an answer to this pleading admitting that the relief sought was proper. A copy of this Answer is included in the appendix hereto. In September of 1960 the trustees filed a motion to strike the "Petition for Clarification of Charges" and the motion to strike was set down for a hearing on October 11, 1960. As that hearing opened the trustees withdrew their motion to strike and the court stated that it was about to proceed on a hearing on the merits of the "Petition for Clarification of Charges". At this point your petitioner objected, stating that your petitioner had appeared at that hearing for another purpose and was prepared for a hearing on another issue and should not be expected to proceed to a hearing on the merits where evidence would be required, when it has been summoned to answer a motion to dismiss. The court overruled this objection and proceeded to a hearing on the merits. Your petitioner proceeded and took part in the said hearing under protest and renewed the objection at several stages of the hearing, and at the conclusion of the hearing requested an opportunity, even if the opportunity consisted of only a few days, to prepare its case on the merits and present the same to the court. This request was denied. Thereafter, the court dismissed the "Petition for Clarification of Charges" and reaffirmed its order directing the questioned conveyances. Your petitioner appealed to the Court of Appeals of Maryland. In the Court of Appeals of Maryland a motion to dismiss was filed and after hearing argument the Court of Appeals dismissed your petitioner's appeal with an opinion which is contained in the appendix to this petition. Your petitioner filed a brief memorandum of points and authorities on the motion to dismiss, as provided for by Rule 837b, Maryland Rules of Procedure. A copy of this memorandum is included in the appendix of this petition. Portions of the testimony which is contained in the record below which show the manner in which the

questions sought to be reviewed were raised in the court below are included in the appendix to this petition.

5. ARGUMENT.

Your petitioner, by reason of the arbitrary and capricious action of the courts below in ordering that property in which she has a beneficial interest be sold for an inadequate price, depriving her of an opportunity to be heard, has been deprived of due process of law as guaranteed her by the 14th amendment of the Constitution of the United States. Adequate notice is essential to a proceeding which will satisfy the requirements of due process. *Pacific States and Box and Basket Company* v. *White,* 237 U.S. 176 (1935); *Coe* v. *Armour Fertilizer Works,* 273 U. S. 413, 424 (1915); *Wuchter* v. *Pizzutti,* 276 U. S. 13 (1928).

To satisfy the requirements of due process a hearing must not be merely *pro forma* but must provide an adequate opportunity for a party to present relevant and material evidence; and it must provide a sufficient opportunity for a party to fairly litigate the issues which are there in issue.

A procedure such as was followed here which allows a person under color of his office as trustee to convey away trust property for a grossly inadequate price, and in violation of the laws of trusts and trust estates in Maryland without allowing a beneficiary of the trust an opportunity to be heard with respect to the irreparable damage which the trustees were causing by the said conveyances, deprived the petitioner of due process of law as guaranteed by the 14th amendment of the Constitution of the United States.

The requirement that the petitioner be afforded an adequate hearing was made more compelling by reason of the clear and uncontradicted evidence adduced at the trial that the trustees were conveying away trust property without adequate consideration, and by the fact that in their answer to the petitioner's attack on the said sales, the trustees

admitted that the relief that your petitioner sought was proper.

Your petitioner prays that a writ of certiorari issue from this Court to review the action of the Court of Appeals of Maryland in this cause.

Respectfully submitted.

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IN THE COURT OF APPEALS OF MARYLAND

No. 304

September Term, 1960

GERTRUDE LANCASTER

vs.

W. GWYNN GARDINER and

JOHN C. HANCOCK, Trustees,

Brune, C. J.,
Prescott,
Horney,
Marbury,
Sybert,

JJ.

Opinion by Brune, C. J.

Filed: May 4, 1961

The appellees, Substituted Trustees under the will of S. Spearman Lancaster, have moved to dismiss the appeal herein on three grounds: first, that it is not timely as to an enrolled decree; second, that it is from a non-appealable discretionary order; and third, that it is defective as to one order because the appeal therefrom was filed before the order itself was filed. From the voluminous record transmitted to this Court it is evident that this case is merely one chapter in lengthy litigation involving the trust of the residuary estate under the above will. The appellant, Gertrude Lancaster, is one of the beneficiaries of that trust, and has been represented by a number of different counsel in various phases or stages of the proceedings, at least four of whom, Mr. Gilmore, Mr. Rysticken, Mr. Bowen and her present counsel, Mr. Fitzgerald (of the Virginia bar) have represented her successively during the period since July 11, 1959, when the Trustees filed the petition which initiated the proceedings out of which this particular controversy has grown. The appellant filed her answer to the petition on August 17, 1959, through Mr. Gilmore and Mr. Carlyle J. Lancaster as her solicitors.

The will of the decedent provided (in the events which happened) that the trust should end twenty years after his death, which occurred on February 4, 1940. Included in the trust estate was the testator's property at Rock Point in Charles County, which consisted of about 195 acres, some of which was waterfront property. The trustees were directed to sell the trust estate at the termination of the trust, but had no power to sell it earlier. They were, however, empowered to lease it, and predecessor trustees entered into a number of leases with varying terms, some of them providing options to the tenants to buy at market prices at the end of the trust, and one giving a right of first refusal; and at least some of the tenants were given the right to remove improvements erected by them. The validity and the exact nature and extent of the rights of various tenants were uncertain and were subject to some dispute.

In anticipation of the sale to be made at the termination of the trust, the appellees filed their petition of July 11, 1959, seeking the instructions of the court with regard to the lands held by the tenants. Before any hearing was held on this petition, and apparently with the informal approval of the court, the trustees entered into negotiations for the settlement of all matters between themselves and the various tenants, subject to the approval of the court. These resulted in most instances in tentative agreements for the sale of the leased properties to the respective tenants thereof at prices leased prop[illegible]n appraisals obtained by the Trustees from ap- based upon competent appraisers. A two-day hearing was parently co[illegible]anuary, 1960, at which the appellant was repre- held in Jan[illegible]her then counsel, Mr. Gilmore. At the conclusion sented by h[illegible]aring Judge Gray delivered an oral opinion ap- of the hear[illegible]n principle the proposed settlements and convey- proving in [illegible] be made pursuant thereto and directing that ances to b[illegible]ate surveys be obtained upon which to base a appropriat[illegible]d deeds. Such individual surveys were obtained in decree and [illegible], 1960. Due to some accident or mistake, a form February, [illegible]. thereafter drafted to carry out Judge Gray's of decree [illegible]ver reached him and about three months later a views neve[illegible] was prepared and submitted to him. This was duplicate w[illegible]n May 14, 1960 and was filed on May 17th. It will signed on M[illegible]ed to as the decree of May 17th. This decree ap- be referred [illegible]he sale by the trustees to the respective tenants proved the [illegible] interests therein of twelve lots and the compromise claiming int[illegible]s of others in respect of two lots (for which no of claims [illegible]le offers of purchase were received) by the pay- acceptable [illegible] the Trustees of $500 as to one lot and of $250 as to ment by the[illegible]r. With regard to the lots which the Trustees were the other. [illegible]ed to sell, the court found that the prices offered authorized [illegible]ted the current market retail values, and that these represente[illegible]ere substantially higher than could be obtained in values wer[illegible]t of the sale of the entire property, if that were the event [illegible] possible.

Meanwhile, there was controversy over the sale of the balance of the Rock Point property, which greatly exceeded in acreage the lots leased to tenants. The appellant had had a survey made of the entire tract, which she claimed was needed for the successful sale of the large tract and which she wanted the Trustees to pay for. She also wished to purchase or acquire as part of her share of the estate a particular lot. There was a hearing on these matters before Judge Digges on May 14, 1960, at which the appellant was represented by Mr. Rysticken as her counsel. The court expressed approval of the appellant's request that the Trustees purchase the survey, and also expressed approval in principle of the sale of some specific lots at their fair values, one of which was sought by the appellant. Subsequently, the Trustees reported the private sale of several lots, including the sale of one to the appellant; and these sales were finally ratified in August, 1960. No appeal was taken from the order of ratification. These proceedings were quite separate from the settlements with tenants covered by Judge Gray's decree of May 17th. They show, however, a willingness of the appellant to have the Rock Point property sold otherwise than as a single tract.

Upon petitions filed early in June, 1960, some amendments, assented to by the Trustees, to the decree of May 17th were requested by tenants and approved by the court. These changes were, of course, within the thirty day period when the court had full revisory power over that decree under Maryland Rule 625.

On June 11, 1960—also within the thirty day period—the appellant, through her then counsel, Mr. Bowen, filed a so called "Petition for Clarification of Charges." This sought a redetermination of the purchase price of lots covered by the decree of May 17th on the ground that the prices approved by that decree were not in accord with the appraisals obtained by the Trustees. The Trustees answered on June 24th. Because of the vagueness of the petition they also

sought an amplification of it in the nature of a bill of particulars. Mr. Bowen furnished a copy of such a document to the Trustees, but he was discharged by the appellant as her counsel before it was signed and filed with the clerk. The appellant's new and present counsel, on instructions of his client, disavowed this particularization at the hearing on October 11th, which is more fully referred to below.

There had been no order to stay the operation of the decree of May 17th; and so far as we are advised or can discover from the record no request for a stay was made. The decree of May 17th accordingly became enrolled thirty days after its date. Maryland Rule 625; *Hancock* v. *Stull*, 199 Md. 434, 437, 86 A.2d 734, and cases therein cited; *Riviere* v. *Quinlan*, 210 Md. 76, 122 A.2d 332; *Monumental Engineering Co.* v. *Simon*, 221 Md. 548, 158 A.2d 471. Assuming that the "Petition for Clarification of Charges" amounted to a motion for rehearing, it is clear under the Rule and cases just cited that the filing of the petition did not have the effect of rescinding the decree of May 17th or of suspending its operation. These cases also show that a motion for rehearing does not extend the time for appeal. Accordingly, if the appeal were (as it may well be) really from the decree of May 17th, it would have to be dismissed as not being timely under Maryland Rule 812 a, since not taken until after the expiration of thirty days from its date.

The "Petition for Clarification of Charges" which, despite some doubt, we shall treat as a motion for reargument, operated under Rule 625, to permit revision of the decree, if or to the extent, that the court might deem revision to be proper. The Trustees, after some negotiations with Mr. Fitzgerald and evidently in an effort to bring matters to a conclusion, on September 19, 1960, filed a motion to strike the petition. This motion came up for hearing on October 11, 1960. At that time the appellant was represented by her present counsel and by Mr. Wigginton, of the Maryland bar, and other parties, of whom there were a number, were repre-

sented by their respective counsel. Early in these proceedings the Trustees withdrew their motion to strike, and the court then went into a hearing on the merits of the "Petition for Clarification of Charges," in which the appellant's counsel participated very extensively. After the hearing Judge Gray signed an order dated October 26, 1950, which modified the decree of May 17th as to one tract, increasing the sale price from $2500 to $2845 (a change already agreed to by the purchaser and the Trustees), and which dismissed the Petition and affirmed the decree of May 17th, except to the extent of the above modification.

The appellant now contends that the hearing on October 11th deprived her of a proper opportunity to present her case, since the hearing was expected to be only on the motion to strike and not on the merits, and that she was not then prepared to submit her full evidence on the merits. The transcript shows that there was a colloquy of some length between the appellant's counsel, the court and, to some extent, the Trustees and their counsel. The upshot of it was that, although both the appellant's and the Trustees' counsel expressed some doubts about going on with a hearing on the merits, they actually did go ahead and all parties agreed that they wanted to dispose of the matter. Late in the proceedings the appellant did bring up the matter of a continuance to present some additional evidence partly through examining the appraisers who had been employed by the Trustees and who were not present in court, and partly through another appraiser.

The court suggested a proffer of such evidence. It then developed that the appellant had not interviewed either of the appraisers employed by the Trustees and that the discrepancies alleged in their appraisals were based upon the appraisals and upon surveys which were already before the court and were available for use in argument. It further developed that the appellant was unable even to name the prospective new witness, much less to say what his testi-

mony would be, since no statement which could have been included in a proffer had been obtained from any appraiser The court declined to grant a continuance. The Trustees, particularly Mr. Gardiner, were examined fully as to the appraisals which they had obtained and certain discrepancies as to lot lines involved in the appraisals and shown by subsequent surveys.

We have gone into the background of this case with unusual fullness for the consideration of a motion to dismiss because the order of October 26, 1960, dismissing the petition or motion for rehearing was a discretionary order; and the only basis upon which an appeal from such an order would lie would be an abuse of discretion. *Jacobs* v. *Boalmear*, 41 Md. 484; *Bailey* v. *Bailey*, 186 Md. 76, 46 A.2d 275; *Hancock* v. *Stull*, *supra*, 199 Md. at 437; Miller, *Equity Procedure*, §§ 314, 315. Cf. *Waring* v. *Turton*, 44 Md. 535, 546; *Zimmer* v. *Miller*, 64 Md. 296, 299, 1 A. 858; holding such orders simply not appealable. Cf. also *Bortner* v. *Leib*, 146 Md. 530, 534, 126 A. 890, and *Holcomb* v. *Fender*, 203 Md. 480, 487, 101 A.2d 814. In *Bortner* the court said that such orders were not appealable "when there is nothing on the record to indicate any injustice sustained by the petitioner or any abuse of its power by the court before which the cause was heard." The four cases cited in support of this statement do not seem in point. All of them were in of the Court of Appeals in acting upon an appeal from his of the Chancellor acting upon a motion for a rehearing, not of the Court of Appeals in acting upon an appeal from his order. The language about "injustice sustained by the petitioner" is taken from the Chancellor who was acting in the exercise of his original jurisdiction. (In one of those cases, *Dorsey* v. *Hammond*, 1 Bland 463, there is a notation at the end of the case that an appeal was dismissed by the Court of Appeals, but there is no opinion of the latter Court.) *Holcomb* v. *Fender*, *supra*, cites *Bortner* (as well as *Hancock* and *Bailey*) and condenses the language of *Bortner* with

regard to appealability to the statement that "no appeal lies * * * unless there is a showing of injustice to the petitioner or an abuse of power by the lower court." (203 Md. at 487). We believe that the words "injustice to the petitioner" have crept into these cases inadvertently, though they may be regarded as merely expressing the idea that injustice to the appellant (not "petitioner") resulting from the abuse of discretion renders a discretionary order appealable, rather than as stating a new and broad ground for appeal from a discretionary order. We reaffirm the rule as stated in *Jacobs*, *Bailey* and *Hancock*, above cited.

Insofar as the appellant's contentions based upon going ahead with the hearing on the merits are concerned, we find nothing to show an abuse of discretion. The appellant at least acquiesced in going forward on the merits, her counsel stating (Transcript, page 11): "I must say we are not quite prepared to go ahead on the merits, but I will do the very best I can."

Nor do we find any abuse of discretion in the court's refusing a continuance. Data supporting the appellant's attacks on the appraisals made for the Trustees were already before the court for whatever they were worth, and the hoped for testimony of some undetermined appraiser brought up in the midst of the hearing was at best a dubious basis for granting a postponement.

The appellant's further assertion that the Trustees' handling of these sales and compromises involved such gross mismanagement that it was an abuse of discretion for the court not to prevent a sacrifice of the interests of the beneficiaries resulting therefrom, is, in essence, a complaint that the court did not agree with her contentions. It is evident that the court gave careful consideration to the problems involved, including the element of settlement or compromise (which the appellant elects to dismiss as wholly insubstantial), and did so both before signing the decree of May 17th and at the hearing of October 11th. At the latter

hearing it also gave full consideration to the alleged discrepancies between the appraisals and surveys.

Our conclusion is that the appellant has shown no abuse of discretion on the part of Judge Gray in dismissing her petition or motion and in refusing to modify the decree of May 17th further than he did. We are not passing on the merits of that decree, which are not before us on this appeal, but we may note that there is no suggestion of any such situation as existed in *Saltzgaver* v. *Saltzgaver*, 182 Md. 624, 35 A.2d 810. Suffice it to say that, unlike the situation in *Saltzgaver*, this case was heard *in extenso* on the merits, that no error is suggested as to the applicable law, and that there is no suggestion that the appellant was unable, physically or otherwise, to take a timely appeal from the decree of May 17th, had she chosen to do so. This Court has shown no disposition to extend *Saltzgaver* to reopening decrees in ordinary equity cases heard on the merits. Cf. *Vierling* v. *Holt*, 197 Md. 522, 527-528, 80 A.2d 24.

Insofar as the order of October 26, 1960, is concerned, we accordingly find nothing to take this case out of the general rule that an order denying a petition for a rehearing is not appealable.

The appeal entered prematurely from the refusal of the trial court to strike out the order of October 26th, even if properly before us, is disposed of by what we have already said. It is based upon the denial of a motion to strike a discretionary order. The motion to strike was also addressed to the discretion of the court. It was carefully considered by the court and the learned trial judge filed an opinion setting forth his reasons for denying it. We need say no more as to their sufficiency than to observe that they make it quite clear that the denial of the motion involved no abuse of discretion. We need not pause to consider whether or not the appellant, who had herself contracted to buy a single lot out of the tract, was estopped to complain

of the sales to others on the ground that the sales of some individual lots impaired the value of the tract as a whole, which complaint was the basis for her motion to strike.

Finding no basis upon which to support a claim of an abuse of discretion by the trial court in entering the discretionary orders appealed from, the appeal will be dismissed.

APPEAL DISMISSED; THE APPELLANT TO PAY THE COSTS.

PETITIONER'S MEMORANDUM OF POINTS IN THE COURT BELOW

IN THE COURT OF APPEALS OF MARYLAND

No. 304

GERTRUDE LANCASTER

vs.

W. GWYNN GARDINER and

JOHN C. HANCOCK, Trustees

ARGUMENT

I. THE APPEAL IS NOT UNTIMELY.

A. The "Petition for Clarification of Charges," which was filed within thirty days of the order of May 17, 1960, which the Petition refers to, gave the trial court jurisdiction to rule on the petition pursuant to Rule 625, Maryland Rules of Procedure, which provides:

> "For a period of thirty days after the entry of a judgment, *or thereafter pursuant to motion filed within such period,* the court shall have revisory power and control over such judgment. After the expiration of such period the court shall have revisory power and control over such judgment, only in case of fraud, mistake or irregularity." (Emphasis added.)

B. Even after enrollment, a decree may be attacked by petition if it appears, as in this case, that the matter was not heard upon the merits and that justice requires that the enrollment be set aside. *Saltzgaver* v. *Saltzgaver,* 182

Md. 624 (1944); *Folck* v. *Chadwick*, 190 Md. 461 (1947). Accord, *Pugh* v. *Waclowski*, 211 Md. 346 (1956); *Vierling* v. *Holt*, 197 Md. 522 (1950); *Rucker* v. *Rucker*, 185 Md. 539 (1945); *Green* v. *Green*, 182 Md. 571 (1944); *Miller* v. *Mitnick*, 163 Md. 113.

> "Enrollment is a theory based on the obvious necessity of having a time fixed at which litigation must end, and the parties to it made secure in their rights. But this principle must give way when a hard and fast adherence to it would produce injustice," Marbury, C. J. *Rucker* v. *Rucker*, 185 Md. 539 (1945).

C. The matter was never heard properly on its merits. In the trial court, appellant was served with notice to show cause, if the appellant were able to, why the appellant's Petition for Clarification of Charges should not be stricken from the files. Appellant appeared at the Court at the appointed time prepared to show that the Petition presented a valid issue and should be set down for a hearing so appellant could present its case. (Transcript of Hearing of October 11, 1960,* pp. 3-4, 10, 11; Docket entry #4.)

Instead, the trial court proceeded to an immediate hearing on the merits of the Petition, to appellant's great surprise, over appellant's objection, and without allowing even the briefest of opportunities to obtain the evidence it needed to present appellant's case fully. (T. 105, 6, 8).

D. The trustees have so mismanaged the matter of the sales which are under review in this appeal, violating every duty imposed upon them by the law of Trusts and Trustees in Maryland, that the Court below abused its discretion in failing to intervene and prevent an obvious sacrifice of interests which were then completely under the supervision and protection of the Court.

1. In an answer filed to the Petition, the trustees agreed in writing to the relief which they now oppose.

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* Hereinafter referred to as "T."

2. W. Gwynn Gardiner, and John C. Hancock, Trustees herein, testified under oath that the relief sought in the Petition is proper. (T. 63, 99)

3. No reliable appraisal was obtained for the property about to be sold. (See Memorandum and Opinion of R. C. Zantzinger, Sr. and Theodore F. Menk; T. 97, lines 11-24; T. 105-108.)

The written memorandum on which the trustees relied for an appraisal bears on its face enough defects by way of inconsistencies, omissions, and obvious errors to require that it be disregarded.

4. No survey was employed as a guide in deciding what should be sold or what price should be asked, nor was the so-called appraisal correlated with the survey, as it should have been. Note the discrepancies discussed in the Transcript at the following pages: 46, 48, 51, 56, 58, 59, 62, 63, 69, 71, 75-78, 82, 85, 91, 99, 101-104.

5. No appraisal was ever made of what effect the May 17 sales would have on the bulk of the property remaining. (T. 44, 45, 53, 54)

6. No attempt was made to find other buyers who might pay more.

II. THE DISMISSAL OF THE PETITION FOR CLARIFICATION OF CHARGES IS APPEALABLE ON THIS RECORD.

Appellee-movant is in error in contending that the Judge's action in dismissing the petition is unappealable for being based on the Judge's discretion. Granting a motion for rehearing is unappealable since it is not a final order, but an erroneous dismissal of a proper petition for revision of a decree is appealable both for ordinary error and for abuse of discretion, both of which are present in this case.

"In all cases courts must exercise a discretion in the sense of being discrete, circumspect, prudent, and the exercise of cautious judgment, but that is a duty generally laid upon all officers as well as private individuals. Judical discretion, in its technical sense, means something more. It is that power of discretion exercised to the necessary end of awarding justice and based upon reason and law, but for which decision there is no special governing statute or rule." *Saltzgaver* v. *Saltzgaver, supra,* quoting Bowers' *Judicial Discretion of Trial Courts.*

Respectfully submitted,

Gertrude Lancaster, by Counsel

Tolbert, Lewis and FitzGerald

By _____
Henry St.J. FitzGerald

Loker, Wigginton & Loker

By _____

IN THE CIRCUIT COURT OF
CHARLES COUNTY, MARYLAND

In Re: Estate of	:	
S. Spearman Lancaster	:	Equity No. 2359
Deceased	:	

PETITION FOR CLARIFICATION OF CHARGES

The Petition of Gertrude Lancaster by Perry G. Bowen, Jr. her solicitor respectfully represents unto Your Honors:

1. That Heretofore an order was passed by this Honorable Court permitting the trustees to sell to certain individuals lots of ground out of the tract of land which is the subject of the trust involved in the within cause certain portions of which have been amended.

2. That the appraisers secured by the trustees in the within cause placed a valuation of $20.00 to $25.00 per front foot with a depth of 150 feet on the lots fronting on the water which were to be sold as aforesaid.

3. That the prices, fixed in the order of this Honorable Court heretofore passed cannot be reconciled with the valuation as aforesaid and do not appear to take into consideration the fact that in several cases the lots in question are of substantially greater depth than 150 feet, of greater water frontage than originally considered, and are being sold for less than the appraisal obtained by the trustees.

WHEREFORE your Petitioner as one of the beneficiaries of said trust prays this Honorable Court to re evaluate the amounts fixed for the purchase of said lots in said order and where necessary amend the same to reflect the correct price based on the appraisal of front foot area as well as back area for those lots whose depth is substantially in excess of 150 feet and for those lots whose water frontage does not reflect the valuation of $20.00 to $25.00 per front foot.

AND as in duly bound etc.

Perry G. Bowen, Jr.
Attorney at Law
Prince Frederick, Maryland

Certificate of Service

I hereby certify that a copy of the foregoing petition was mailed postage prepaid to Robert Barbour, Esq., La Plata, Maryland; W. Gwynn Gardiner, Esq., Woodward Bldg., Washington, D.C.; John Hancock, Esq., La Plata, Maryland; and Edward Diggs, Esq., La Plata, Maryland this 11th day of June 1960.

Perry G. Bowen, Jr.

IN THE CIRCUIT COURT OF CHARLES COUNTY, MARYLAND

In Re: Estate of	:	
S. Spearman Lancaster	:	No. 2359 Equity
Deceased	:	

ANSWER TO PETITION FOR CLARIFICATION OF CHARGES

Answering the petition files in this cause by Gertrude Lancaster by and through her attorney Perry G. Bowen, Jr., your respondent trustees state:

1. We admit the allegation of paragraph 1.

2. The appraisers made an appraisal fixing a value of Twenty-Five Dollars ($25.00) per front foot by a depth of one hundred fifty (150) feet on the lots facing on the Wicomico River. No appraisal of any other amount has been filed in this cause to our knowledge.

3. We are not advised by the allegation as to what property the petitioner wishes to challenge or to have a clarification of.

However, the trustees wish to advise the Court of the facts known to them.

A. The appraisers fixed a valuation on the frontage foot running back from the high-water mark one hundred fifty feet (150) and fixed a definite value on each lot on that basis.

Now, Grimes and Oystercamp's lots were involved in litigation, which litigation was heard and determined by by the Chief Justice of this Circuit and the trustees ees in the Decree of the Court were directed to cause a a survey to be made of each lot and to convey the he same in accordance with said opinion and survey. ey.

The Decree ree of the Court speaks for itself and the testimony in y in the case shows the basis of the settlement. Now, ow, the trustees in these cases, as in other cases, unless aless directed by the Court otherwise, will sign a deed eed to these perspective persons and the other in ac accordance with the Decree of the Court and the sur survey, and where it is found that there is additional al acreage included in the survey, the parties in in interest will pay for it under agreement to do so exc except as to the petition in this case, who gets one hu hundred sixty (160) feet without paying any additional amount for the additional ten (10) or more feet feet.

The trustees tees have no knowledge of any variation as to any other ther property but the trustees, will in each instant, conconvey in accordance with the decree of the Court and thd the survey when payment is made in accordance the therewith and the agreements as to payments.

W. Gwynn Gardiner

John C. Hancock
Trustees

I hereby certify thfy that a copy of the aforegoing Ang Answer was mailed to Perry Gy G. Bowen, Esq. at Prince Frederederick, Md., on June 24, 1960. 0.

HEARING, OCTOBER 11, 1960,
JUDGE JOHN B. GRAY, PRESIDING

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MR. FITZGERALD: May it please the Court, Mr. Bowen filed a petition to clarify the charges made for certain parcels trust estate sold by the trustees and incorporated in an Order of May 14th.

THE COURT: May the 14th.

MR. FITZGERALD: Signed by your Honor. It was my understanding that this morning we had before the Court a petition by the trustees to strike that petition, and the trustees were seeking an opportunity to show your Honor why that petition should be striken from the record.

I received a notice to appear here on the last Monday of September, or the first Monday in October, to show cause or participate in a hearing in which the trustees were going to have that petition stricken from the record. I received a call from Mr. Hancock, one of the co-trustees, saying that the Grand Jury was in session, that the hearing could not occur on the date in the notice, and it was continued until today.

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MR. FITZGERALD: If your Honor please, I must say we are not quite prepared to go ahead on the merits, but I will do the very best I can.

THE COURT: That is what we are here for.

MR. FITZGERALD: It was our understanding, or feeling, it would be Mr. Gardiner's burden to try to strike our petition and set it aside.

THE COURT: He is, in effect, withdrawing his motion to strike.

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MR. FITZGERALD: If your Honor please, may I request the opportunity to bring Mr. Zantzinger and Mr. Menk here? I did indicate I would like to examine them.

THE COURT: We are going to get them here this afternoon?

MR. FITZGERALD: We don't have them and we don't have a subpoena out for them. I tried to reach Mr. Zantzinger perhaps a dozen times last month.

THE COURT: Unless you can make some proffer that you think will be satisfactory to the Court that they can be helpful in resolving the matter now at issue, I don't propose to come back here another day and take up the time of everybody concerned here. This represents a lot of manpower that we are spending on this case, and we would only agree to postpone the hearing in the event you are able say to the court by proffer their testimony will be helpful in your case.

MR. FITZGERALD: All right, sir; may we talk about that after we get finished with Mr. Osterkamp. I just don't want to waive my right at this point.

THE COURT: If we are going on with the defense testimony it will be waived.

MR. FITZGERALD: I would like the opportunity to call Mr. Zantzinger and Mr. Menk, and an appraiser of our own choosing to indicate what these lots are worth, and I might say to your Honor, we want to move this case as fast as we can, and if your Honor would give us so much as a week, a day, we will be back again to present—

THE COURT: Well, the trouble is, this week is one of the very few weeks for literally months that this member of the court can set aside to come here and hear this case.